CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

January 12, 2007

Call To Order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 10:00 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Phil Blair, Gene Huguenin, Bob Leidigh, and Ray Remy were present.

Item #1. Public Comment.

There was none.

Consent Items #2, 3, 4, 7, and 8

Commissioner Leidigh pulled Item Nos. 5 and 6 from the consent calendar.

Commissioner Remy proposed changing a typographical error found in Item 4 of the December Minutes at page 21 – the word "root" to be changed to "route."

Commissioner Remy moved to approve Consent Items 2, 3, 4, 7, and 8.

Item #2. Approval of the September 12, 2006, Commission meeting minutes.

Item #3. Approval of the November 14, 2006, Commission meeting minutes.

Item #4. Approval of December 14, 2006, Commission meeting minutes.

Item #7. In the Matter of Robert Gran, FPPC No. 06/478 (1 count).

Item #8. Failure to Timely File Major Donor Campaign Statements.

a. In the Matter of Palomar Medical Center Medical Staff, FPPC No. 06-0558 (1 count).

b. In the Matter of Palomar Medical Center Auxiliary, FPPC No. 06-0564 (1 count).

c. In the Matter of Pomerado Medical Staff, FPPC No. 06-0567 (1 count).

d. In the Matter of Demetra Marcus, FPPC No. 06-0821 (1 count).

e. In the Matter of Torrance Emergency Physicians Inc., FPPC No. 06-0940 (1 count).

Commissioner Blair seconded the motion. Commissioners Remy, Huguenin, Blair, and Chairman Randolph supported the motion, which carried with a 4-0 vote. Commissioner Leidigh abstained, commenting that he "was not here and has no knowledge."

ITEMS PULLED FROM CONSENT

Item #5. In the Matter of Brent Wilkes, FPPC No. 03/791 (2 counts).

Item #6. In the Matter of Daniel Spence, FPPC No. 03/214 (1 count).

Item #5. In the Matter of Brent Wilkes, FPPC No. 03/791 (2 counts).

Enforcement Division Chief William Williams and Senior Commission Counsel Melodee A. Mathay came before the Commission. Ms. Mathay asked the Commission if they had any questions in this matter. Commissioner Leidigh asked for clarification relating to the statute of limitations as he did not see anything in the default decision and order indicating that this matter was within the statute.

Ms. Mathay responded that in order to toll the statute, the probable cause report needed to be served before May 31, 2005; it was served on May 27, 2005. The Enforcement Division went forward with the accusation in November 2005, so the statute was protected.

Commissioner Leidigh continued stating that, in general, it appeared late in the game for something that occurred in 2000, being that it is now 2007.

Chairman Randolph called for other questions, comments, or public comment. There were none.

Commissioner Remy moved to approve Item 5.

Commissioner Blair seconded the motion. Commissioners Remy, Huguenin, Blair, Leidigh, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item #6. In the Matter of Daniel Spence, FPPC No. 03/214 (1 count).

Ms. Mathay summarized the case stating that a stipulation had been entered into with Mr. Spence, a former Software Specialist III with the former Health and Human Services Agency Data Center. There was one count of violating Government Code section 87407, wherein Mr. Spence was negotiating prospective employment with an employer relating to a contract in which he participated in the decision to award. The recommended fine was $3,500.

Commissioner Leidigh asked about the fine amount. It appeared Mr. Spence made about $300,000 on the contract and the penalty was being reduced below what the Commission could impose. It seemed to be fairly egregious with one exception. There was information indicating that there was some consultation with the agency's legal counsel who did not think there was a

conflict. Commissioner Leidigh was seeking more detail on whether there was a written opinion and how this situation occurred. Commissioner Leidigh stated that if Mr. Spence, in good faith, went to the agency's counsel and asked if he had a problem and the response was "no," then there is some mitigation there. If not, then Commissioner Leidigh is concerned about why the fine amount is being reduced when Mr. Spence made so much money from this situation. Commissioner Leidigh voiced, again, his concern about cases being dealt with that are 5-1/2 years old.

Ms. Mathay responded that the complaint was received in 2004, and was assigned for full investigation in 2005. The investigation was completed between 2005 and 2006. She commented that in balancing priorities in working on enforcement cases, together with staffing changes in the Enforcement Division, she thought this case was handled as quickly as was possible. Ms. Mathay could not speak outside of the stipulated facts that the Enforcement Division had negotiated with counsel who represented Mr. Spence. She stated that this was a very unusual situation in that Mr. Spence's former agency wanted to keep him because he was highly qualified and was saving the State a lot of money. Some complicity by the agency for Mr. Spence's conduct was put into the mitigating factors because the former agency was aware that this could be a problem. Mr. Spence did not directly ask for conflict-of-interest advice; the agency's director did, and the director was the only one who received that advice and, basically, thought that Mr. Spence did not have a conflict. Mr. Spence never sought the advice himself, but was aware of conflict-of-interest rules. The Enforcement Division did not see the case as a maximum fine situation; and do not have a lot of cases of this type. If there had been more aggravating factors, and not the Agency's involvement, Mr. Spence would probably have been fined a maximum fine. However, as this was a case of first impression, the Enforcement Division thought that $3,500 was an appropriate fine for the conduct.

Commissioner Leidigh thanked Ms. Mathay for her comments.

Chairman Randolph asked for questions, comments, or any public comments. There were none.

Commissioner Blair moved to approve Item 6.

Commissioner Remy seconded the motion. Commissioners Remy, Huguenin, Blair, Leidigh, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item 9: Prenotice Discussion Of Amendment To The Recordkeeping Requirements.

Luisa Menchaca, General Counsel, Valentina Joyce, Legal Division Commission Counsel, and Chief of the Technical Assistance Division Carla Wardlow came before the Commission.

Ms. Joyce explained that the recordkeeping provisions of the Political Reform Act require candidates, treasurers, and elected officers to maintain detailed records, accounts, bills, and receipts necessary to prepare campaign statements and to establish that campaign statements are properly filed. These provisions serve a vital purpose of the Act as stated in section 90007 to allow for the auditing of committees to encourage compliance and to detect violations.

Regulation 18401 implements these provisions by identifying the records that must be maintained and the supporting original source documentation that must be retained. Subsection (a)(4)(B) identifies canceled checks as the original source documentation that must be retained for expenditures of $25 or more or for a series of payments for a single product or service totaling $25 or more. Today, many bank customers do not receive their original canceled checks. Also, as a result of changes made in federal banking laws that went into effect in October 2004, banks are increasingly processing checks electronically and, in the process, checks are truncated, that is, they are taken out of circulation by the receiving bank or by an intermediary financial institution. Payment is, therefore, made on the basis of an electronic image that is made of the front and the back of the original check. The proposed amendment would permit the use of copies of canceled checks, including those that have been electronically processed, to satisfy the requirements of the original source documentation, as long as that copy was obtained from the financial institution. The amendment would serve the needs of those that do not have their original canceled checks, while satisfying the need of auditors to obtain sufficient, competent evidence, including original source documentation of campaign expenditures.

Commissioner Huguenin stated that his experience with these kinds of records is that if one uses a standard commercial-size check, which is about one-third the size of an 8-1/2 x 11 sheet of paper that is printed in Quicken or in some other normal way, it just barely fits into a normal size 10 envelope. What is received from the bank is about the size of a standard personal check. To that extent, the "true to size" language in the proposed regulation is somewhat of a very slippery standard, because the commercial regular check received, which is about the size of a number 10 envelope, is reduced to about the size of the check that you write your personal checks on, which is about half that size of it actually. When the Commission adopts a regulation which states that they have to be "true to size," does it mean "true to size" of the original check that was issued, or does it mean just really large enough that all of it can be seen? Usually the banks are not sending them back in the same size that they were processed. They are, in fact, sending them back in a significantly smaller image. Commissioner Huguenin further stated that although the checks are legible, he wondered if the Commission would be creating some difficulty for themselves or for the regulated community with this "true to size" language.

Ms. Joyce commented that the intent in including that language was an expression of concern that the smaller versions of checks might not be legible. She stated that, for example, what people typically get back from their banking institution is called an "image statement" on which they have copies on an 8-1/2 x 11 sheet – that sheet having copies of multiple checks which are smaller than the original checks. She stated she did not believe that when this was drafted the Legal Division was contemplating the fact that anyone would have larger checks than the personal checking accounts that people have. The concern was legibility; that if too many checks appeared on this statement, they would be so small that they would not be legible.

Commissioner Huguenin noted that in footnote 4 on page 3 of Ms. Joyce's explanatory memorandum, the last sentence talks about the size – "substitute check is slightly larger than a standard personal check." He stated he appreciated that and that he had also seen 8-1/2 x 11 sheets of paper printed out that have two checks across from each other all the way down the page – basically, a scanned image that is then printed and sent back. His only concern was that

the Commission be very clear as to whatever standard is being articulated in order for people to qualify. Although "true to size" is not clear to him, he stated it would be no big deal as long as it is clear for everyone else.

Commissioner Leidigh added that he had the same exact concern when he read it. He stated he has seen thousands of campaign checks, most of them signed "LHO," and they print out on a tractor feed and are about this size. If the bank is not going to return a copy that is that same size and it says "true to size," it appears the purpose being sought is not being accomplished. He fully understood and supported the need for it to be legible. The whole purpose of recordkeeping is so that audits can be done. Mr. Williams' crew needs to be able to come in, and the auditors from FTB need to be able to come in, and they want to see the source documents. The problem is that the banking world has changed and those source documents that you used to get all the time, you do not get anymore. Because the banking industry has changed, what does the Commission accomplish in setting up a standard that is not going to be met. He stated people will not be able to go to large financial institutions and say, "Well, for us, we want a different way." Legibility is the key. He would like to hear from the regulated community that sees these things coming back from the financial institutions. Perhaps, by saying "reduced to no less than 50 percent of the size of the original." There has to be two standards: (a) legibility, and, (b) cannot be reduced more than some percentage. But, to him, saying "true to size" implies it looks exactly like the original and he agreed that that is a problem.

Chairman Randolph asked whether the word "legible" would cover it. She wondered if the Commission needed something in addition to legible. She suggested saying, "contain a legible image of the front and back." She added that if it is too small, then it is not going to be legible.

Ms. Joyce agreed stating that legibility was the concern expressed by accounting specialists from the Enforcement Division and persons from the Technical Assistance Division when discussing the language.

Chairman Randolph asked whether Ms. Joyce had any concerns about just saying, "legible." She did not.

Commissioner Leidigh asked to hear from the Enforcement Division to ensure they did not have a problem with the suggestion.

Ms. Menchaca stated that if they had a second part added, as suggested by Commissioner Leidigh, it would be additional assurance that there would be no debate over what is "legible."

Commissioner Leidigh responded that that was exactly his concern. He does not want to have a situation where somebody has something the size of a postage stamp saying, "Well, I can read it," when it is not reasonably legible. He would assume that financial institutions are not sending those back.

Chairman Randolph added that it appears we are circling back to the same problem – if you say it is a minimum size, and the financial institution does not make them available in a standard way in that size. The other option is just to define "legible" more clearly to say, "when we say

legible, we mean you have to be able to identify the payor and the payee and the account information."

Luz Bonetti, Accounting Specialist, Enforcement Division, advised they are concerned that if the regulation changed and a small copy of an image check is received, and they go to the representatives asking for a better copy, they may respond, "We've met what the regulation is requiring, why are you asking for another copy – here's an image check, how many copies of the same image check do you want?" This way, Enforcement could say, "Go back to your bank and get a better copy or a canceled check – in this instance, for this one particular check or for these five checks that we can't read." Enforcement staff wanted to have that option. That was their only concern.

Commissioner Leidigh agreed adding that under the regulation, as it is written, they would have to do that for all the checks if they are coming back in standard from the financial institution at less than "true to size." Commission Leidigh asked what the Commission could come up with that would meet the needs of Ms. Bonetti. He understood that Ms. Bonetti has a job to audit and that the Commission has a job to enforce the law, and they both need to be able to do that without playing games with people about whether it is or is not legible. By the same token, where the banking industry has gone to a particular procedure and that is the way they come back, the Commission ought to be able to accommodate that. He stated the whole purpose of this exercise in doing this amendment to the regulation is to allow for that and the Commission should not amend it and still have a rule that does not work in the real world.

Ms. Bonetti stated she understood his concerns. She reiterated that the concerns of the Enforcement Division are that lowering the bar in the regulation would not give them the right to request a better copy, because they would provide an image copy if we were stuck on some sort of terminology like that. It is not to say that the Enforcement Division has not used image copies because most of them are legible and it is a very rare occasion when they cannot be read. Their only concern was that the Enforcement Division would still have the right to ask for a copy of one or two cancelled checks.

Chairman Randolph asked Ms. Bonetti if it would be enough to require them to go back and get another copy if the regulation says "legible." In other words, if the copy given to Ms. Bonetti is a little too small, would it be enough to say, "It's not a legible copy; you need to give me something legible."

Ms. Bonetti agreed saying she did not feel it would be a confusing term and that most people would agree if something is legible or not.

Commissioner Blair questioned whether "legibility" is an issue of size or handwriting.

Ms. Bonetti explained that sometimes on image checks, there may be 20 on one page – something like microfiche copies, so they are a little bit shady, small, and not really clear. Sometimes a magnifying glass is needed to even look at them. There have been instances where Enforcement cannot discern what the payee is or the amount. That information must be gathered based on other records, confirming that, "This is fine in this instance." However, if it were to be

an expenditure that we were not comfortable with or not quite sure of the purpose, then Enforcement would want to have the right to ask the treasurer to obtain more legible copies, like a canceled check, for example. However, if the regulation says otherwise, they will be able to say, "We've met the requirements of the regulation."

Commissioner Leidigh stated that, first of all, the Enforcement Division has a recordkeeping requirement. During an audit, the auditor finds no source document and proceeds to "ding" filers based on a recordkeeping requirement. The second issue is when the Enforcement Division is actually auditing and trying to trace through the money and the legibility. To require, for a few checks, "true to size" copies of everything in order to satisfy the recordkeeping requirement seems as if though the Commission is not really accomplishing much. That is not the way financial institutions produce them in the normal course of business. There ought to be a way to say that if the auditors come in having a question about a specific check, they can require that that check be produced in a size that is legible, but not have somebody get "dinged" based on their recordkeeping when they have pages and pages of checks that have been sent back by the financial institution.

Ms. Bonetti assured Commissioner Leidigh that was not at all the intent of the Enforcement Division. She reiterated that their concern was the lowering of the requirement and having it be held against them.

Commissioner Leidigh stated he supported that goal and Ms. Bonetti's goal of being able to audit. He was trying to figure out whether the Commission could come up with language that everyone would be comfortable with and would also accomplish that purpose. He wanted to know how this would work in the real world and suggested hearing from people on the other end of the process.

Ms. Bonetti reiterated that it was not the Enforcement Division's intention to "ding" everyone for recordkeeping – they have enough work. She added that she understood the point that Commissioner Leidigh was making – if the word "legible" works. She thought that would work for her and had no further concerns with that.

Chairman Randolph asked for further questions or comments before taking public comment. There were none.

Chairman Randolph asked for public comment. There was none.

Chairman Randolph summarized by stating it sounded as if the Commission is generally uncomfortable with "true to size," but comfortable with "legible," and, our auditor is comfortable with "legible." She asked that for adoption, Ms. Joyce return with "legible" and eliminate "true to size."

Item 10: Prenotice Discussion Of Amendment To Regulation 18944.2.

Commission Counsel Brian Lau and Luisa Menchaca, General Counsel, came before the Commission to present an amendment to regulation 18944.2 relating to gifts made to a public official's agency.

Mr. Lau explained that the proposed amendment clarifies that a gift of goods or services may be considered a gift to the agency even when the donor makes a monetary payment for the gifts or services to a third party. Generally, a gift is a payment conferring a personal benefit when equal or greater consideration is not received. Public officials receiving gifts are subject to gift limits, reporting requirements, and disqualification. However, some gifts may benefit the official's agency without providing any significant or unusual benefit to the official. In these circumstances, the Commission has determined that the gifts should be considered a gift to the agency, not the official. Regulation 18944.2 outlines the requirements.

(1) The agency must receive and control the gift;
(2) The payment must be used for official agency business;
(3) The agency must determine the official who shall use the payment; and
(4) The agency must memorialize the payment in a written record.

Mr. Lau continued stating that when a donor makes a monetary payment for goods or services to a third party, there is a question as to whether the "receive and control" test applies to the monetary payment to the vendor, or to the goods or services provided to the agency. The Act defines "payments" to include property, services, or anything else of value, whether tangible or intangible. Consistent with this definition, the Legal Division has applied the "receive and control" test to the payment of goods and services to the agency, not to the monetary payment to the vendor. For example, when a donor purchases an item, such as a refrigerator, as a gift to the agency, the agency must receive and control the use of the refrigerator, not the monetary payment to the store. Since the Act designs "payment" to include goods or services, there is no distinction between receiving and controlling a payment, and receiving and controlling the use or services. Complicating this analysis is the question of whether an agency receives and controls a payment of goods or services not physically received by the agency. The term "receives" is broad enough to include constructive possession, which is the control or dominion over property without actual possession or custody. An agency that controls the use of goods or services, even without physical possession, has constructive possession and can satisfy the "receive and control" test. As another example, if a donor offers an agency free airfare, and the agency accepts the offer independently selecting the official who will make the trip, the donor can then purchase the ticket in the name of the official directly from the airfare provider. Under this example, the agency received the payment because it had constructive possession of the payment, the free airfare, and controlled the use of the payment by independently selecting the official making the trip. However, if circumstances indicate that the donor intends for a particular official to benefit, such as of the donor purchasing the ticket in the officials name prior to offering the ticket to the agency, or prior to the agency determining which official should take the trip or use the ticket, the agency has not received or have control of the payment. Mr. Lau asked that the Commission know additionally that if the donor indicates any intent that a particular official benefit, the payment falls out of the exception for gifts to an agency under the

third element, which is that the agency must, in its sole discretion, determine which official will use the payment. In addition to the proposed amendment to subdivision (a)(1), Staff has made several non-substantive changes and proposes noticing the amendment to regulation 18944.2 for adoption at the March 2007 Commission Meeting.

Chairman Randolph called for any questions or comments.

Commissioner Remy asked whether the head of a state agency who has scheduled a major staff meeting or retreat, negotiates with a hotel who throws in a suite as part of the deal, in terms of providing the number of rooms reserved. That suite generally always goes to the head of the agency. The agency has negotiated the contract and the deal, and further, they make the decision that the director or the cabinet officer is going to stay in the suite. He further asked if they would be exempt under this and be allowed to make this suite available to the cabinet secretary or the department director.

Mr. Lau responded that this would be possible as long as the donor did not provide any intention or indication that this suite was for the purposes of the head of the agency, and as long as the agency made the determination on its own, fully complying with the other elements of the gift to an agency regulation.

Commissioner Blair had a slightly different question for Mr. Lau. If the World Trade Association is doing a trip to China and a donor states, without mentioning any name, that he would like a city council person to attend, the trade agency is going to pick the council person that has been selected from that group of people. Would that be an issue, as long as the company that donated the ticket did not mention any name, just a position?

Mr. Lau responded that just limiting the ticket to a group of officials is enough to remove it from the gift to an agency regulation. A donor has the opportunity to say, "This ticket is for use by this trade organization for this meeting," but they could not limit it to which official – they would have to stop there. They could not limit which official could receive the gift. By limiting it to a group of people, that would be enough to remove it from the regulation.

Commissioner Leidigh pointed out that in this case, airfare and lodging were specifically included. Typically, if someone makes arrangements for airfare, they get the name of the passenger and, in the case of lodging, the name of the hotel or motel guest is given. He asked how, as a practical matter, the process would work in order to meet the purposes of this regulation, which is that the donor is not to select who gets the benefit; the agency is supposed to do that. However, now you have the donor going out and buying the airline ticket with someone's name on it. What is the process envisioned that will ensure that the "I's" are dotted and the "T's" are crossed?

Mr. Lau explained that if the donor purchases a ticket or lodging in the name of an official prior to making this offer to the agency and prior to the agency complying with the elements of the gift to the agency regulation, then a problem exists in that now the donor has indicated a preference as to which official will use this particular ticket or lodging and, therefore, the gift falls outside of the regulation. However, if the donor makes the offer to the agency prior to purchasing the

ticket in any particular name, the agency, complying with the regulation, then instructs the donor to purchase the airfare or lodging in the name of a particular official, it is at this point that they have satisfied the regulation and are then able to proceed with making that particular gift to the agency.

Commissioner Leidigh asked, in terms of the procedure, what the agency would be expected to do by way of memorializing that situation. There are recordkeeping requirements in the regulation that are not being amended. Will something be required from the agency, in writing, saying, "Thank you, we accept your offer and here is who is going?"

Mr. Lau responded it was his thought that under element 4 there is the requirement that they memorialize it in writing. As far as any answer directly to the offer, he did not believe that would be the requirement. The requirement would be any kind of public document which indicates who the agency has selected and what they are accepting and who it is from. As far as the other requirements of the regulation, Mr. Lau does not believe they would be required to make an acceptance in writing to the donor as part of the regulation. He believes the regulation already provides sufficient guidance, as far as sufficient weight of evidence in that the agency has made this determination prior to the donor purchasing the tickets in the name of an official.

Ms. Menchaca added that the regulation in its present form states that you have 30 days after the agency receives payment. So, in a situation like that, where the reservation is made or the transaction has occurred, the agency would then have 30 days to memorialize all that information in terms of the nature of the activity, the name of the donor, and so forth. There are 30 days to do it after the acceptance or the receipt of the payment. The Legal Division did not think it would require an amendment at this time.

Commissioner Leidigh advised that his question goes to the changes that the Legal Division is making -- not to the existing regulation which has been around for a decade. He stated he knew it is a real benefit for the agency to not have to take in the money and turn around and put it out because there is a lot of accounting paperwork headache that has to go on to do that. Again, Commissioner Leidigh expressed that he was particularly focused on the airfare and lodging were a name is typically attached at the time that the payment is made to the vendor and he just wanted to be sure that the Commission is comfortable that the agency, in fact, selected the individual whose name is going to appear on the airline ticket or the hotel reservation, and that the steps required here are, indeed, followed. He wondered whether the Legal Division had given thought to that, adding that if Ms. Menchaca was comfortable with this, then it was okay by him.

Chairman Randolph asked if there were any comments from the public on this item.

Mike Martello, on behalf of the League of Cities, City Attorneys' Division, FPPC Committee, commented he had been looking at this regulation a little differently because they have not really gone through the process where they received calls that somebody wanted to buy tickets. However, it does arise for them and his thought is that it is a good change with respect to tickets they receive. He stated that some years ago, George Bush, Madeleine Albright, and Colin Powell were running around and it was $250 to hear them. Corporations were buying the tickets

and giving them to the city. Mr. Martello's understanding is that this would suggest that if the donor paid the vendor for the tickets and then gave them to the city, as long as the city controlled the dispensing of those tickets, that would be okay. Mr. Martello commented that in response to Commissioner Blair's question to Staff (and this is not proposed for change), but number 3, where it says, "as long as the donor does not designate the specific official or officials who may use the payment," he thinks staff indicated that that means by name or title. He asked for clarification because if the city receives a gift and it is for the City Council, have they designated a specific official? As Mr. Martello understands the answer to Commissioner Blair's question, they did designate a specific official, because they said, "give it to the City Council, the city manager, and the economic development director." Mr. Martello thinks that by the donor adding words to designate a specific official by name or title might be helpful in clarifying. Mr. Martello had another question relating to subdivision (a)(2), where the payment is used for official agency business. Giving as a real life example, he stated that what happens for local agencies is that they get a developer who has a really different kind of project in their town wanting to fly the City Council, planning director, or whatever, to Anaheim to show them a similar project. The developer sees this regulation and says, "Well, the way we'll cover that is we'll give the agency 15 tickets." That may be okay and they will name who the people will be – we all kind of know it is the City Council, planning commissioner, whoever it is supposed to be. Mr. Martello asked if it would not be prudent to add language into number 2 that basically says that "the payment is used for official agency business" – and, stealing words from Mr. Lau's staff presentation added – "and provides no unusual benefit to the official." Mr. Martello continued with his example stating that the way this arises is that "we are flying down to see this special project; we have a tent set up with 5-Star catering, and Huey Lewis is playing or the Jersey Boys are performing." He asked how that would be separated out. Mr. Martello declared that, unfortunately, that is what they actually see. Whether they put you on a bus or a plane, they want to bring you down and they want to entertain you a little bit. These were his only comments on this issue in an attempt to make it a bit more accountable and clear.

Chairman Randolph asked if there was any further public comment before addressing Mr. Martello's comments. There were none.
Chairman Randolph summarized that it appeared that the Commission was okay with the language proposed for amendment. The question now is whether there is anything else to be added. She started with "by name" or "title." She thought that would be a nice, simple change would probably be useful.

Mr. Lau commented that it was his belief that that would go against the Legal Division's current advice if a limit has been set to a group of individuals. Typically, donors are not allowed to limit gifts to a group of individuals. The gift is to the agency. The agency must have the final determination as to who will use that gift.

Chairman Randolph, reading from lines 13 and 14, stated that "so long as donor does not designate the specific official or officials by name or title" basically clarifies that the Commission does not mean Jane Smith or the Mayor, who happens to be Jane Smith. Chairman Randolph did not think it would change the Legal Division's advice.

Mr. Lau responded that he thought adding that language would allow for a donor to give the gift to the City Council. Chairman Randolph disagreed. Commissioner Leidigh pointed out that it is preceded in line 13 by the word "not." Mr. Lau agreed. Chairman Randolph again read that "as long as the donor does not designated the specific official or officials by name or by title."

Commissioner Blair pointed out that, to be consistent with line 18, the phrase used is "class of officials." That's where he thought it took care of that, after asking the question.

Commissioner Leidigh disagreed stating that that is the agency's memorialization.

Commissioner Blair continued that instead of using "name" or "title", use "official" or "class of officials."

Commissioner Huguenin clarified that, in other words, that would be the formulation of words that might be used in line 13.

Mr. Lau agreed with Commissioner Blair.

Chairman Randolph also agreed that this was a good suggestion and asked the Legal Division Staff to consider it before adoption.

Chairman Randolph was a little more concerned about the "unusual benefit" language.

Mr. Lau explained that the "unusual benefit" language was included in the *Stone* Opinion at the time, which is what the regulation was based on. When the regulation was passed, the "unusual benefit" language was removed.

Chairman Randolph asked for clarification as to whether the "unusual benefit" language was originally in the regulation and then removed, or was in the opinion. Mr. Lau responded that it was originally in the *Stone* Opinion, which the regulation was based on, but it was never in the regulation. Mr. Lau added that as far as adding it back, it was beyond the intent of his proposed clarification.

Chairman Randolph again asked that the Legal Division consider it and bring it back as a decision point at the adoption stage.

Mr. Lau agreed.

Commissioner Huguenin added that it sounded like it might not be so unusual.

Ms. Menchaca commented that since the Legal Division would be looking at a couple of the others subsections, they could also look at the various issues. Adding onto the question that Commissioner Remy had relating to "the head of the agency," Ms. Menchaca stated that one of the things discussed in the past with Staff is the question of "who is the agency." She gave the example of when the Executive Director is the official accepting payments on behalf of the agency, and then ends up deciding that a benefit goes to him/her. Ms. Menchaca suggested that

there should be some method or policy ensuring that this official will not be allowed to make decisions to accept payments that would benefit him/her. She stated that the Legal Division has advised, via advice letters, that agencies establish a method or policy to ensure that this does not occur. She suggested this could possibly be another issue that could use a little more clarification.

Chairman Randolph stated she was not sure she wanted to go down that road or that the Commission needed to go down that road. She asked if anyone disagreed.

Commissioner Blair asked whether the weight of the word "benefit" was a free concert or a trip to the Caribbean – per chance, if the meeting is in the Caribbean and the benefit is perceived as a vacation. Most of these cases, it is to a national conference, exhibition, or something that is not a benefit to the agency – it is just a way of saving the agency money.

Ms. Menchaca stated that in the past, she has seen benefits that have been tangible things like a car that the official then decides will be used by him/her in their official capacity. It is just something, in terms of drafting, the Legal Division has considered. She stated, however, that if the Chairman thought the Legal Division should not go down that road, the Legal Division would limit itself to subsections 2 and 3.

Chairman Randolph acknowledged Ms. Menchaca's comments that the Commission has already dealt with this matter in advice letters. She added that unless there is an indication of a particular problem, her thought is that the Commission can stay with what has come up so far. The matter will come up for adoption in March. Ms. Menchaca and Mr. Lau agreed.

Item 11: Emergency Adoption Of The Officeholder Account.

John Wallace, Assistant General Counsel, Luisa Menchaca, General Counsel, and Chief of the Technical Assistance Division Carla Wardlow, came before the Commission to present Item 11, which implements Senate Bill 145 which reintroduces officeholder fundraising back into the campaign provisions of the Act. Due to the urgency nature of this bill, the Commission was asked to use this meeting in two ways: first, as an adoption meeting for an emergency regulation, which will be in effect immediately upon adoption; and, second, as a sort of prenotice hearing so that the Commission can give feedback for when Staff returns in March with a final product. He asked the Commission to look at these regulations in those two manners.

Mr. Wallace stated that grafting the officeholder fundraising rule back into a comprehensive campaign package that actually prohibited such fundraising did raise some unusual challenges. As a result, the Legal Division came before the Commission with four regulations as opposed to one because Staff believes that four regulations are necessary to implement the legislation.

Mr. Wallace began his presentation with regulation 18531.62, which provides guidance regarding the establishment of officeholder accounts and committees. Subdivision (a) establishes the trigger for when candidates who win elections may raise officeholder funds. Staff is proposing a bright-line rule which would allow fundraising for officeholder purposes upon election, rather than attempting to have those officeholders wait until they actually assume

office. In looking at the language, Mr. Wallace explained that it did seem to create an anomaly that the Commission might want to address. If the Commission allows officials to start fundraising immediately after the election, you essentially end up with a situation where somebody serving a four-year term gets five contributions from a single contributor or, put another way, a person serving a four-year term gets five aggregate limits worth of contributions for officeholder purposes. If the Commission believes that this is an issue they would want to address, the Legal Division has provided a decision point on that. Mr. Wallace directed the Commission to the first page, subdivision (a), lines 6 through 9. He commented that that language would require an officeholder-elect to attribute any contributions received between election and assuming office to that officeholder's first full year of office. That would somewhat lineup the numbers.

Subdivisions (b), (c), and (d) are fairly self-explanatory. They set out the bank account and committee rules for officeholder committees. These provisions are generally adapted from the rules applicable to other candidate-control committees. Subdivision (e) sets out the parameters for the use of these officeholder funds. The regulation was crafted to try to prevent any circumvention of the campaign contribution limits that are currently within the Act. As a result, (e)(1) sets out a general statement of what types of uses officeholder funds can be used for and (e)(2) further clarifies it by tying it to one of the Act's statutory definitions. There is a decision point, as well, at subdivision (e)(3), lines 4 and 7, on the second page. At this point, the Legal Division is recommending that that entire subdivision be deleted. Reflecting further on that language, it does seem it would probably be better dealt with in a factual situation, if somebody wrote in for advice. It was initially intended to direct people on how they could pay for these types of expenditures. Mr. Wallace stated that the Legal Division does not think it helps clarify by having it in there. The Legal Division, at this point, would ask that it be removed. The Enforcement Division proposes that it be retained, but make it a mandatory bar to using officeholder funds for those purposes.

Commissioner Huguenin asked if Mr. Wallace was referring to decision point 2. Mr. Wallace confirmed.

Commissioner Huguenin continued stating that they could not settle with the Commission using those funds.

Mr. Wallace confirmed that that is the issue that is raised and that the Legal Division feels that at this point it is premature to deal with it in this section. It may be something to look at in a different type of project.

Mr. Wallace continued with regulation 18531.63, stating it is probably the most complicated aspect of the new legislation. He stated it was the Legal Division's attempt to clarify the cumulation rules that apply with respect to officeholder contributions. When the Legal Division looked at the legislative history on this item, what was discovered was an overarching intent to deal with situations where incumbents were termed out and had no new campaign committees in order to use the new campaign funds to pay for officeholder expenses. As the memo points out, these people were caught in the middle with no ability to raise funds for these types of purposes. As a result, the statute, as adopted by the Legislature, has a very strict cumulation rule. The

Legal Division has not tried to change this rule, but, rather, has tried to clarify the language of the statute. Subdivisions (a) and (b) of the regulation are the Legal Division's attempt to do that.

Subdivisions (a)(1) and (2) deal with the cumulation rule in connection with future campaigns and future elections. The cumulation rule would require that any officeholder contributions be cumulated with contributions to any elective office that officeholder seeks during their current term of office. There is a decision point at lines of 15 through 18, arising out of the legislative history. The law, as in applies to campaign committees, allows separate, maximum contributions for general and primary elections. In essence, even though there is a $3,000 contribution limit – a candidate can receive $6,000 toward a single seat -- $3,000 in each election. There was some language in the legislative history suggesting that this new rule would require them to cumulate and start returning at a $3,000 threshold, basically reducing the two contributions to one. Staff does not believe that that was the intent. They thought it was inadvertent drafting in the legislative report. Mr. Wallace stated that the Legal Division has offered the Commission a decision point that would clarify that the trigger only kicks in after the threshold is reached – sort of a combined threshold from both the primary and the general election.

Subdivision (b) similarly tries to clarify and separately state what the cumulation rule does with respect to officeholder fundraising. It is aimed at the narrow situation where somebody, say in the Governor's office, might be able to receive $20,000 officeholder contribution, but is running for an office that might have lower limits. In that subdivision, we have clarified that their officeholder fundraising would be subject to those lower limits as well.

Subdivision (c) is an idea that was presented to the Legal Division at the Interested Persons' Meeting held on the item. Subdivisions (c) and (e), together, are intended to protect contributors from inadvertent violations of the contribution limits by virtue of the officeholder's cumulation requirement. Subdivision (c) requires a specific notice of the effect of giving an officeholder contribution and subdivision (e) is the protective, sort of the safe harbor, provision.

Subdivision (d) sets out the mechanics of the return requirement out of the statute. Mr. Wallace stated that the language in a regulation that governs the return of excessive contributions was copied. Minor changes had to be made to adapt them to this form or framework. That is the reason the Legal Division did not just cross-cite to that regulation. Subdivision (d) has one decision point at lines 17 through 20. That came up in a discussion at one of the Legal Division internal meetings as to whether an officeholder would be required to raise additional funds in order to comply with the return requirement of this section. Obviously, there are policy considerations on both sides: Do you really want that officeholder getting more contributions from more people? How does that reduce the influence that the contributions might have on them? On the other hand, do you want to reward a candidate or an officeholder who immediately spends down all his officeholder funds right before filing the 501 for a new election, thereby avoiding the harsh impact of the cumulation rule. Both of those are policy considerations and the Legal Division thinks either is supportable because, obviously, the Commission can interpret the statute to further the Act's purposes. But the Legal Division does not have a recommendation on that and leaves that decision to the Commission on a policy-basis.

Regulation 18531.64 deals with the winding down and termination of officeholder accounts and committees. The regulation sets an end date as to when officeholder funds can be received and that is, basically, when the officeholder leaves office or his term of office ends. Subdivision (b)(1) does allow a fixed extended time period after that date for the officeholder to wind down officeholder activity. It is an option/decision point for the Commission. The Legal Division put in 30 days, as an example, but the Commission can choose a longer period if they desire. The Legal Division did suggest avoiding the existing committee termination rules for the specific reason that the complexity of those rules applied to an officeholder committee seemed to be a bit of an overkill. Mr. Wallace had copies of that regulation in the event the Commission wanted to discuss it further.

Chairman Randolph asked what the Commission's surplus fund rule was.

Ms. Wardlow responded that it is the date that the candidate either leaves office or the closing date of the post-election statement for a defeated candidate.

Mr. Wallace added that would possibly be another approach. Mr. Wallace continued stating that subdivision (b)(2) allows for redesignation of officeholder committees in narrow circumstances where the person is just going into the next term of the same office. That is consistent with the Legal Division's redesignation rules as applied in other contexts, primarily to local officials.

Subdivision (c) sets out, based on the surplus funds rules, permissible ways of disposing of officeholder funds. It is pretty consistent, except that the Legal Division adapted it to this unique situation.

Mr. Wallace finished with regulation 18544, which incorporates the Commission's requirement to adjust the limits every two years into the existing regulation that sets out that requirement for other purposes.

Mr. Wallace advised that the Legal Division did receive one comment letter from Rebecca Olson of Olson, Hagel, and Fishburn. She asked whether the limits in SB 145 apply to political parties and asked the Commission to think about that issue. The short answer on that is that nothing in the statute or legislative history, and nothing in these regulations provide an exemption for political parties. They would be subject to the same rules as any other person. If the Commission desires, that is something that may be looked at in March for the final adoption of the regulations.

Chairman Randolph asked if there were any further questions or comments from the Commission before accepting public comment. There were none.

Chairman Randolph asked if there was any public comment.

Karen Getman of Remcho, Johansen,and Purcell, appearing on behalf of the State Assembly. She apologized for not getting her written comments in, but offered that this week had been a busy one. She voiced her appreciation for the Commission's efforts in making an emergency regulation as there had been a number of questions needing to be answered quickly. She advised

that the State Assembly had two concerns with the emergency regulation and then also a drafting suggestion that the Commission was asked to consider.

Ms. Getman's first concern was with decision point 1: one option was that contributions received during the election year are going to be accumulated with contributions during the following calendar year. The Assembly's concern is that the Commission does not have statutory authority to implement this part of the regulation. The statute, while it is arguably unclear in certain areas, is very clear in terms of this point. The statute very clearly states that "you can accept contributions beginning the day after the election." And, it very clearly states that "you are subject to a particular limit on contributions per calendar year." By the plain language of the statute, you can accept contributions beginning the day after the election and you are subject to a contribution limit that applies to that calendar year. The Assembly does not see where the Commission has the authority to say that we are going to ignore that part of the statute for your first calendar year. The Assembly understands the policy concern, but simply does not think that the statute allows the Commission "to go there."

Ms. Getman continued with the second consideration, being one of a more practical nature having to do with decision point 5 – the termination. The Assembly completely agrees with Staff that there is no reason to make this as complicated or as long as the committee termination rule for regular candidate committees. Ms. Getman advised that the Assembly thinks that 30 days is too short. She gave the following example: "It's not uncommon at all to hold some sort of reception for your staff on your last day in office. Normally, you would pay for the cost of that reception with a credit card. While you may not get the credit card bill for another 45 days, and then by the time you make the payment and the check you make the payment from clears your account, you are 60 to 70 days out. So, under an ordinary circumstance, you have to hold the committee open just to at least clear those last expenses." Ms. Getman suggested that maybe 90 days would allow all of the accounting to clear, but would not create a situation where committees are being held open for too long.

Ms. Getman's third point attempts to define officeholder expenses in 18531.62(e)(1), which states that officeholder contributions can be used for things such as community events, travel, charitable donations, and the like. The Assembly's concern is that two different standards are being set up for what an officeholder expense is. There is already a standard in regulation 18525, which has been around for a very long time. That regulation tells people what they can pay for out of their current committee account and what kinds of expenses have to be paid for out of account for reelection – in essence, what is a candidate expense. The only difference that is set up with an officeholder account that is going to be set up under this new system, rather than using your current campaign account, is that the funds in an officeholder account set up under the new system cannot be used to make contributions to others. The Assembly believes that is the only difference between the two systems, otherwise, there can be two officeholders standing side by side – one using their current campaign account, one using an officeholder account created under this system, and they should be in the same situation – with that one exception. What this regulation seems to imply is that maybe there are two different sets of rules and it was Ms. Getman's thought that the Commission will have unintended problems.

Ms. Getman continued stating that this regulation talks about using officeholder funds for travel. They can only be used for travel if the travel is not related to a campaign event. So, the fact that you are traveling and you are an officeholder does not mean that you can use these funds for travel. So, on the one hand, Ms. Getman does not think that this list necessarily gets you anything, because it does not give you any kind of the safe harbor – it does not tell people out there that they can clearly use their officeholder funds for this or that – you still have to subject them to the test that you would, for instance, under 18525 – for whether it is acceptable as an officeholder expense or not. It also creates, potentially, a problem because under the rules of statutory construction, when you have a list like this and then kind of a catch-all phrase, the courts would say that the catch-all is intended to pull in other things like the "list-like" things. This list does not include staff retreats -- a very common use of officeholder expenditures. So, you have a list that is, in some ways, vague and, in some ways, under-inclusive –in other words, it is over-inclusive and maybe just causes more problems than you need. The Assembly thinks maybe, that in drafting the final regulation, the Commission might be better off simply making reference to regulation 18525, which seems to work very well, but clarifying that if the officeholder funds have been raised pursuant to this statute, there is an additional prohibition and that is the prohibition against using those funds to make contributions to others.

Commissioner Blair asked Ms. Getman whether the use of the word "others" translates to election-related activities.

Ms. Getman explained that the statute is clear that these funds cannot be used for transfers to committees of any type – candidate or ballot measure.

Commissioner Leidigh added that in looking at the amendments that were made to the bill on March 14, 2005 – that being the last version of the bill – it is instructive to see what was struck and what was added. The bill, as originally introduced, said that you could use it for anything that was authorized by the Act, except election-related activities as defined. It deleted that language and left it with "expenses associated with holding the office." Commissioner Leidigh asked about the personal use laws. He asked if the Commission did not already define what officeholder expenses were associated with holding the office, He asked if this is what Ms. Getman was talking about.

Ms. Getman responded that what she is talking about is the regulation that actually is part of the one bank account rule – 18525, which also states that if you have a committee for your current term of office and you have a committee for a new term of office, or a new office that you are running for, how do you tell what expenditures have to be made out of which committee. That is where the Commission has defined what is an officeholder expense. Basically, you can use your committee for your current term of office for what are officeholder expenses. And, you have to use the committee for the office that you are running for – for anything that is a candidate-related expenditure. That has been around for a very long time and is something that both the Commission and the people at the Legislature are very comfortable with. Under that regulation, people know what is an officeholder expense and what is not. Although Ms. Getman, admittedly, was not involved in the drafting of it, she felt it safe to assume that the statute was drafted with this regulation in mind and the reference to officeholder expenses really ties into that regulation nicely – again, with the one exception that the officeholder funds under this new

statute have an additional restriction. Otherwise, there does not seem to be any difference, nor does there seem to be any intent to make any difference. Ms. Getman was worried that this new regulatory language could be interpreted to create two different systems and cause unnecessary confusion.

Commissioner Leidigh commented that regulation 18525 primarily defines what an election-related expense is, as it talks about using a campaign bank account for election to a future term of office. It says that you can use those funds for things not enumerated. Your argument made sense before they amended the bill, because it said that anything else you are allowed under law, but they took that language out and he thought the Commission had some language somewhere about the question of expenses related to holding the office.

Mr. Wallace explained that what the Legal Division also cited to in the regulation was the definition of an election expense as opposed to the holding office expense. He pointed out that in section 82015, there is a list of things deemed to be campaign expenses.

Mr. Wallace, commenting as to the list of expenses, that the Legal Division pulled the "laundry list" out of one of the Assembly's analysis of the legislation. It was intended to just be a set of examples; it was not intended to be exclusive. The exclusive or more important standard under that regulation would be subdivision (e)(2), which states they are prohibited from using it for contributions or transfers, which is in the new statute. They are also prohibited from using it for election-related activities as defined in 82015(b)(2)(c) – that was a list of election activities added when the co-sponsored language was added into the statute. One of the concerns with 18525 was that it is more beneficial to cite to section 82015 than it is to regulation 18525 because 18525 does have some restrictions that are not in the statute. Mr. Wallace added that this could be looked at closer in March.

Ms. Getman added she could not recall what the exact concerns were that the Assembly had with that approach when they considered it. She stated, however, that she thought this is something that may be worth the Commission looking at more closely when it comes up with the final regulatory language. For purposes of the emergency regulation, Ms. Getman thought all that was really needed was the language that Mr. Wallace spoke about, which clearly states that these funds cannot be used for election-related expenditures and they cannot be used to make contributions to other committees. She suggested, for current purposes, that the Commission stick with that and certainly not go the route of making a different list – look at whether 82015 is appropriate, 18525 is appropriate, and come up with something that makes sense. She stated that she is concerned about going the route that is before the Commission as it appears there are two different systems and she does not believe that the Commission wants to go there.

Commissioner Leidigh agreed with Ms. Getman's point that the Commission should not have two separate systems. The articulation of the purpose for the bill was to resolve an inequity for officeholders who were termed out. The end result, except where there were specific restrictions placed, the end result should get us to basically the same point. Commissioner Leidigh gave the following example: "If I just got elected and I'm termed out, then I should be able to raise money within the limits set forth here and spend it within the criteria set forth here, the same as if I wasn't termed out and I just had a committee to run for the next term of the same office." He

agreed with Ms. Getman's point that the more nuances placed in the statutes, the more confusing it becomes and, if someone started out thinking they were not going to run for re-election, for whatever reason, and suddenly changed their mind, and now they are gearing up, they should not have to go through some big consultation with their lawyer to figure out whether the rules of what they can do with the money changed. Commissioner Leidigh stated that he was just not certain whether 18525 is the way to go, or the other, and so he is in agreement.

Ms. Getman added that she did remember one concern the Assembly had with the difference between 18525 and 82015 and that was that 18525 talks about communications that are made in the three months prior to an election and they do not have to contain express advocacy; however, if they are made in the three months prior to an election and feature the candidate, then they cannot be made out of the officeholder account, and 82015, which talks about the definition of a contribution, makes reference to express advocacy as the standard. There is a discrepancy there, but the Assembly is comfortable with the language in 18525.

Chairman Randolph stated she could see the point of not setting up two standards, but she did not think that 18525 "is there yet." She stated the Commission needed to take a look at that in conjunction with this set and come up with an appropriate way to structure it so that it is consistent. One option would be to pare down (e)(1) to mirror the statute and accept that there will not be a "laundry list" at this point – it is too early for that. If the Commission basically mirrors it, it would not be inconsistent with the statute, rather, it would be expenses associated with holding office.

Mr. Wallace commented that the Legal Division did not have a problem with deleting (e)(1) and taking out the "list" and keeping it more along the lines of just a general statement.

Ms. Menchaca clarified that the Legal Division would not delete (e)(1), but perhaps say "use for the purpose of paying expenses associated with holding office," which is what the statute says. We would delete the "laundry list," but keep the substance. And we would keep (e)(2).

Commissioner Leidigh added this could be done with the understanding that when the Commission returns for the permanent adoption, it may be changed due to its becoming more explicit, one way or another. But, right now, the Commission would just use the words of the statute.

Chairman Randolph agreed adding that that would be the idea for now and then the Commission would take a look at putting those two together in the future. As to Ms. Getman's point about decision point 1, Chairman Randolph expressed that she did not think that the language was really necessary, "policy-wise," because the Commission basically already has all these limitations -- it applies to your future contributions; there is a cap on the total amount.

Commissioner Huguenin commented that for the people who were just elected, it is already into the next calendar year and the Commission is talking about re-designating something they already did.

Ms. Getman agreed stating that she thinks the Commission has a problem there. She added that the Commission does not have statutory authority and there will be some cranky people with a good legal argument.

Chairman Randolph stated that she was fine with eliminating decision point 1 and increasing the 30 days to 90 days. She did not see any downside to doing that, but asked if anyone disagreed with that.

Commissioner Leidigh assumed that there was no problem with subdivision (a) that says money cannot be raised after you leave office. What is being discussed is only winding it down.

Ms. Getman agreed adding that it is just a matter of getting the bills collected and paid on time, which, unfortunately, cannot happen within 30 days – if you are talking about a credit card.

Commissioner Leidigh stated that you would need to know that information so that you know what your last amount is that will be donated to charity or whatever will be done with it. You must get those other bills out of the way so that the final check can be written to zero the balance.

Ms. Getman agreed saying that a bank account cannot be closed until all of the checks have cleared. It is just a very practical problem and her thought was that 90 days would more than cover it if the Commission was comfortable with that.

Chairman Randolph asked if there were any other questions of Ms. Getman. There were none.

Chairman Randolph asked if there was any other public comment on this item. There were none.

Chairman Randolph asked the Commissioners if they had any comments on these regulations, reminding them that the trigger would be pulled on them now, so they should speak up now or hold until March.

Commissioner Remy had a question relating to decision point 2. The Staff report suggested that perhaps the Commission should just delete "2." He expressed that he was a little uncomfortable with somebody who suddenly, for whatever reason, had some fines and elects to suddenly use these funds for paying the bill. Then they come to us and we say, "I don't think you ought to." Commissioner Remy was wondering why the Commission did not just go ahead and make a decision one way or another whether the Commission thinks these sorts of funds can be used for those purposes or not.

Chairman Randolph responded by saying that one option is for the Commission to hold on to this section for now, but bring it back in March with more legal analysis, because there will not be any enforcement actions on officeholder funds between now and March and she thinks there are some legal issues as to what is or is not permissible relating to legal defense funds, campaign funds, or officeholder funds. She does not agree that the Commission needs to wait for a factual situation as it is a pretty straightforward question and the Commission has time to really think about it. It is not something that people have to worry about right now.

Commissioner Remy was comfortable with that approach, but stated he did not think the Commission ought to forget it. He would rather see the Commission address the issue and make a decision one way or another, and agreed with Chairman Randolph that March was fine.

Mr. Wallace commented that the Legal Division would remove the language for the emergency adoption and bring it back in March with some clarification.

Chairman Randolph agreed and asked if there were any other questions or comments.

Ms. Getman asked for clarification relating to whether the Commission was removing the language or keeping it.

Chairman Randolph responded that the Commission was removing it for now.

Chairman Randolph summarized that the Commission was in agreement that decision point 1 would be deleted and asked if anyone disagreed with that. There was no disagreement.

Chairman Randolph asked Mr. Wallace if he had any language relating to (e)(1) that he may have drafted in the last five minutes.

Mr. Wallace responded that he did not. Ms. Menchaca responded by reading as follows: "Officeholder contributions may be used for paying expenses associated with holding the office." She commented that she thought this was all the Commission needed for now.

Chairman Randolph asked Mr. Wallace if that sounded good for now.

Mr. Wallace responded that (e)(1) was really sort of a wobbler that does not even need to be there because the statute does say it, but thinks it is a good placeholder if that issue is to be dealt with in March.

Commissioner Leidigh asked if the language was not already in lines 30 and 31 and suggested that all the stuff above that and the "and" could just be deleted.

Chairman Randolph clarified that Ms. Menchaca was just reciting what the sentence would look like and asked Ms. Menchaca to recite it once again.

Ms. Menchaca recited it again, advising that it is just a clause out of the statute.

Commissioner Leidigh asked whether it was "associated" or "related to."

Ms. Menchaca responded that it states "associated" with holding the office.

Chairman Randolph summarized that decision point 2 would be eliminated for now, with the issue coming back in March.

Chairman Randolph asked if there was a motion to approve 18531.62 with decision point 1 eliminated, the language in (e)(1) changed to "officeholder contributions may be used for paying expenses associated with holding the office," and, with decision point 2 deleted.

Commissioner Blair moved to approve Item 11.

Commissioner Remy seconded the motion. Commissioners Remy, Huguenin, Blair, Leidigh, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Chairman Randolph made comments relating to regulation 18531.63. It was her thought that decision point 3, with regard to "primary" and "general" limits, should be included because it is somewhat consistent to the way the Commission has treated "primary" and "general" as separate limits throughout the statutory scheme. She asked if anyone disagreed.

Commissioner Leidigh had a question for Mr. Wallace in terms of the practicality of how it works – how the Commission currently deals with it. Picking the amount of $3,000, just because it is an easier number than whatever the current amount is -- a $3,000 limit for the primary and a $3,000 limit for the general – Commissioner Leidigh wanted to know what the rule was relating to taking in both primary and general money prior to the primary.

Mr. Wallace responded that he believed it was possible to take in both primary and general money, with an obligation to return the money if you lose in the primary.

Commissioner Leidigh asked Ms. Wardlow what the rule was in terms of tracking the money so that candidates could not dip into the general money and spend it if they are in a tough primary.

Ms. Wardlow responded that section 85318 allows a candidate to raise contributions for the general election prior to the primary, but those contributions have to be kept separate – set aside for use in the general election. If the candidate loses in the primary, the money must be returned, minus any fundraising or administrative costs.

Commissioner Leidigh asked what would happen if a member of the Assembly received two $3000 contributions to his officeholder account and that member is going to run for reelection. So you say, "all right, they're maxed out, and somebody takes you out in the primary." What happens?

Mr. Wallace responded by stating that he thought Commissioner Leidigh's question was more along the lines of how a candidate would identify what the contribution was for. Mr. Wallace thought that by indicating a "P" or a "G" on the forms, this would assist in identifying and tracking what the contribution was for. He added, however, that a candidate should not be spending the general money before the primary.

Commissioner Leidigh stated, "but it's your officeholder account; you're in the second year of holding office and you're spending the $3,000."

Mr. Wallace stated that, in terms of the officeholder account, this was the cumulation rule. The officeholder account has specific cumulation and return rules and, basically, what will happen is that the candidate will cumulate over four years of holding office.

Commissioner Leidigh corrected Mr. Wallace stating "it says a two-year term."

Mr. Wallace continued stating that the candidate would get one contributor donating funds up to the statutory threshold –which Mr. Wallace believed is $3,000. The problem being dealt with in that provision is the return requirement, which states that once the officeholder limit is exceeded, the excess has got to be returned. Because the officeholder contribution limit is $3,000, there could be a situation that after that first contribution to the primary in this new office that the candidate is running for, the return requirement kicks in. Mr. Wallace did not think it was intended to create a situation where the candidate would be getting two $3,000 officeholder contributions in a single year.

Commissioner Leidigh once again corrected Mr. Wallace, stating, "No, two years – actually now three years." He gave the following example: "I got elected in November; I set up an officeholder account; I raised $3,000 from "X"; now, in 2007 I'm in office; I raised $3,000 from "X" into my officeholder account; and, now in 2008, I raise another $3,000 into my officeholder account." Commissioner Leidigh thought Mr. Wallace's answer is that Commissioner Leidigh cannot do that because, if he has a committee to run for reelection, he has a limit. The limit is not going to be $9,000; it will be two times whatever the current number is. Commissioner Leidigh asked if he would have to tell them, when they try to give him the $3,000 in 2008, that he cannot take all of it because he's got the committee open to run for reelection and Mr. Wallace is going to cumulate. Commissioner Leidigh wanted to know if his understanding was right or not right -- as long as the contributor had never given Commissioner Leidigh any money toward his election campaign, could Commissioner Leidigh take the $3,000?

Mr. Wallace responded that the way the statute is interpreted is that once the 501 is filed for the new office, you are "cumulating," which means that you are subject to one limit of $6,000 and anything in excess of that would have to be returned.

Chairman Randolph added "or not accept it into your officeholder account."

Mr. Wallace agreed. He further explained that even if Commissioner Leidigh received nothing for the election, since he is cumulating, it is deemed also to be a contribution to the election, both of those accounts are subject to one limit, which is the election limit. Mr. Wallace stated that this provision is very complicated.

Commissioner Leidigh asked Mr. Wallace if "that's this thing where it says "the lower of."

Mr. Wallace asked which provision he was looking at.

Chairman Randolph responded it was on line 24.

Commissioner Leidigh continued asking that if he got elected to the Assembly and he set up his 2008 Assembly account, so that he can start fundraising to run for reelection, and if he also set up an officeholder account – if he got both of those, because he filed the 501 so that he could start fundraising to run for reelection because he's got limits. So, he needs to work at it hard early – so he can't wait until the end and raise large dollar amounts. Commissioner Leidigh stated that if the aggregate would be capped over the term from a single contributor to the aggregate of the primary and general for the reelection.

Mr. Wallace thought that was correct.

Commissioner Leidigh continued, asking if the contributor gave the maximum allowed in 2006 after the election, and in 2007, they would not be allowed to give in 2008 to the candidate's reelection campaign, because they had already maxed out in the officeholder account.

Mr. Wallace responded that that was correct.

Chairman Randolph, in summary, stated she thought the Commission was okay with decision point 3. She then began discussion relating to decision point 4, relating to the question of whether or not a candidate would be required to return funds "if you run out, basically." She kind of liked this provision. She was not quite sure what the Commission's authority to do it would be, but she thought it made sense not to have to go back and replenish. She asked if there were any comments or thoughts on decision point 4?

Commissioner Leidigh asked if this meant that if the candidate is tapped out, they would not have to refund it.

Chairman Randolph agreed.

Commissioner Huguenin commented that "they could have used it to pay those fines."

Commissioner Leidigh explained that that was part of why he went through the exercise with John and Carla that he just did. He asked why should the candidate ever get to the point where they are "over." He supposed the only way a candidate could get there is if they had filed a 501 to run for statewide, and so they had a higher limit that would allow them to take the $3,000 three times, and then they decide, "no, I'm not going to run for that – I'm going to run for reelection again – I'm going to run for a lower office." They wanted to run for Governor and then they decided they did not want to do that, and now they want to run for Attorney General or State Treasurer or something. Commissioner Leidigh was not sure what the practical effect is of that, stating "they shouldn't, by and large, have money that is over the limit."

Mr. Wallace stated he thought the way that this came up at a discussion on that provision was in a situation where somebody might be accepting maximum officeholder contributions over the course of four years and then is running for the same office, the limits are relatively close. Mr. Wallace did not think they were identical yet, but believed they were supposed to be very close. In that case, the candidate has actually gotten four contributions of the maximum amount; the candidate then files the 501 for reelection; the candidate has to return half of that amount –

but the problem is that maybe at the very beginning of the fourth year, the candidate has already spent that money down – there is nothing in there. The way the statute is written, it is not limited to the year the 501 was filed – it is the candidate's entire officeholder term. Mr. Wallace stated that would be where it comes in and, as Staff noted, there are policy arguments on either side. The Commission is able to interpret the statutes to further the purposes of the Act, and if there is an issue of undue influence, Mr. Wallace thinks that is a reasonable interpretation.

Commissioner Leidigh asked if Mr. Wallace was in that situation and he did not have money to reimburse or repay, he would still not be able to take more money from that same contributor into your campaign account.

Chairman Randolph agreed, but stated she thought the idea is "do you have to go out and find new contributors in order to make the money to return it."

Commissioner Leidigh commented that he thought it could come up, in particular, at the next redistricting, or in cases where people are not sure whether they are going to run for reelection to the same office because they do not know whether they are going to get nested with somebody else that they do not think they can beat, and so they wait until that all shakes out and then they say, "oh, no, now I want to run." But otherwise, candidates are typically going to file their 501 and start fundraising right away, because they are under limits.

Chairman Randolph summarized that the Commission was okay with the language in both decision points 3 and 4, and asked if there was a motion to approve 18531.63, including the language in decision point 3 and decision point 4.

Commissioner Remy moved to approve regulation 18531.63.

Commissioner Huguenin seconded the motion. Commissioners Remy, Huguenin, Blair, Leidigh, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Chairman Randolph continued with regulation 18531.64, stating the only issue in this regulation was decision point 5, relating to whether the Commission would want to change 30 days to 90 days. She thought it was reasonable.

Commissioner Blair moved to approve regulation 18531.64.

Commissioner Leidigh seconded the motion. Commissioners Remy, Huguenin, Blair, Leidigh, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Chairman Randolph brought up regulation 18544, the biennial adjustment regulation. She summarized there were no issues with this language and asked if there was a motion to approve?

Commissioner Leidigh had one question, commenting that the statute expressly says that in January of each odd-numbered year the Commission is supposed to do this. This is January of an odd-numbered year and the Commission is having a meeting. He asked if everybody was just

assuming that there had been no change in the CPI and, therefore, $3,000 is what you see and what you get, and if there was any change, it is not enough to move it $100? He asked if the Commission needed a regulation, like they do with the gift, to say that.

Mr. Wallace stated that the Legal Division did not do one for this specific year. They did do the calculations. The difference between that date and the first of the year was nonexistent – and, since you're rounding off, there was no change. But, we can say that in a regulation.

Ms. Menchaca explained that the way the regulation is written, the base of your calculation is 2006, which is when the statute was adopted and then the calculation is then also a forecast for 2006, so in that sense, under the current formula, if it were to be applied today, it cancels itself out. The net change is zero.

Commissioner Leidigh stated he assumed that was the case. It was just that the statute expressly mandates on the Commission the duty in January of an odd-numbered year to do something. He just wanted to make sure the Commission was fulfilling the mandate and doing something so that there would be no question and everyone would know it is $3,000. And, with the gifts, the Commission has a different regulation, and changed the number. He asked if the Commission did not just go through recently and amend 360 to 390. He was just questioning whether the Commission had any obligation to say something official so that anyone searching from anywhere in the world would know that the Commission has done it and that it is $3,000.

Mr. Wallace responded that he thought it was a good issue, but commented that, initially, the Legal Division did not even think this was an emergency item simply because it really was not going to be an issue for two years, but since the Legal Division did do the initial calculation, he thought that was a good point and offered that the Legal Division could probably get something out for March.

Chairman Randolph asked if there was a motion to approve regulation 18544.

Commissioner Remy moved to approve regulation 18544.

Commissioner Huguenin seconded the motion. Commissioners Remy, Huguenin, Blair, Leidigh, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

Item 12. *In re Fulhorst* Opinion request (O-06-193)

Luisa Menchaca, General Counsel, Bill Lenkeit, Legal Division Senior Commission Counsel, and Chief of the Technical Assistance Division Carla Wardlow came before the Commission to present Item 12, which involves a request for a Commission opinion from Stacy Fulhorst, Executive Director of the San Diego Ethics Commission.

Mr. Lenkeit explained that section 85312 provides that payments made for member communications are not contributions or expenditures. It additionally states that payments for member communications made by political parties must still be reported as contributions or

expenditures under the Act's reporting provisions. Regulation 18531.7 was developed to implement the provisions of section 85312, and the questions presented in this request essentially ask what rules apply under the current laws to payments made to and made by political parties for member communications in circumstances that are currently addressed in regulation 18531.7. However, because regulation 18531.7 applies only to payments made for member communications by organizations other than political parties, the questions presented raise certain issues as to whether or not payments made for political party member communications are to be treated differently than payments made for member communications by other organizations, as enumerated in regulation 18531.7. Absent a specific regulation, the application of current law to the questions presented is addressed in Staff's memorandum. As stated therein, Staff recommends that the Commission not issue an opinion in this matter, but rather direct Staff to examine the issues presented as part of a regulatory project to determine if a separate regulation applicable to political party membership communications should be developed to specifically address those issues, after the benefit of receiving public comment through an Interested Persons' Meeting. Issues related to member communications are already scheduled to be examined as part of the Commission's regulatory calendar for this year, and Staff recommends that any issues related to this request be examined as part of that process.

Commissioner Leidigh stated he was not present, obviously, before now. He stated he read through the materials and was a little troubled that the Commission apparently got an advice request from Ms. Fulhorst, and then told her to request an opinion. Now, the Staff comes back with a recommendation to not do an opinion. Commissioner Leidigh agreed with the Staff recommendations. He thought that if the parties are in need of advice, Mr. Olson or Mr. Bell ought to be making the request, rather than a third party. Commissioner Leidigh was not sure what the standing of Ms. Fulhorst was to do that, but was bothered that the Commission led her down this path and, now, has sort of pulled the rug in the end. Commissioner Leidigh was just curious as to why the Commission ended up where it is and why the Commission did not start several months ago to do the regulatory project. He apologized for not knowing the history, again stating that he was not present until now, and perhaps there might be a good and rich history that would explain it all.

Ms. Menchaca commented that the regulatory project and the concepts relating to member communications arose out of not only Staff comments, but suggestions from Commissioners, themselves, that came up around October. At the time that the Legal Division was considering this request, it was something that the Staff fully contemplated could be addressed in an opinion. Since the Commission approved, in December 2006, a regulatory project on the topic, all the issues can be dealt with comprehensively. Basically, the timing between the request and the approval of the regulatory calendar impacted the Staff recommendation.

Commissioner Remy commented that he did not disagree with the Staff recommendation because it seemed as if they wanted to look at this communication issue in a comprehensive way. However, the Commissioner asked about the workload implications.

Ms. Menchaca responded that it would depend on how the parties feel about the existing regulation. Potentially, it could be a project that is not the major part of a regulatory project, but, on the other hand, if there are major concerns about the Staff even looking at how political

parties handle these payments, then it could become a significant part of it. This whole project will be significantly complex.

Chairman Randolph indicated that in the Commission's planning for the year it is assumed that this will be a big project and, resource-wise, the Commission is prepared for it.

Commissioner Remy asked if all of these facets of communications could be adequately covered in the March meeting.

Chairman Randolph stated Staff was not talking about March, and Ms. Menchaca agreed.

Mr. Lenkeit indicated an IP Meeting has been scheduled in early May and that this would come up for prenotice in July.

Chairman Randolph asked for public comment.

Stacey Fulhorst, the requester and the director of the City of San Diego Ethics Commission thanked the Staff for what is viewed in San Diego as an outstanding job on the Staff report. As someone who has to prepare similar staff reports in San Diego, she knows how much work is involved in responding to these sorts of matters and is very appreciative. She continued as follows: "As the Staff has indicated, they are recommending going back to the regulatory process in terms of adopting a regulation for the vast majority of the questions that are raised in my request. First off, I think it's important for you to know the Ethics Commission obviously has no objection to following and to having that rulemaking process and having as many people weigh in as possible. But, I think it's important for you to know that the nature of my request or the reasons behind my request were actually two-fold. The first reason was because, as you know, we have to follow the State law and are permitted to be more, but not less, restrictive. And, in the course of enforcing our local law in conjunction with the State law, we have had a variety of issues come up in San Diego about what are the rules that apply to political parties making member communications that support city candidates. And, because the regulation that was previously adopted by the State only addresses non-political parties, we wanted to come to the State and find out what are the rules that apply to political parties. Those are primarily questions 1 through 8 in my request. The second reason for me asking for advice and/or opinion from the Commission has to do with seeking guidance from the Commission with respect to local regulation of member communications by political parties that support local candidates. This issue is primarily addressed in questions 9 and 10 in my letters. In particular, we asked in our request whether or not in the FPPC's view it was permissible for local jurisdictions to prohibit coordination of those types of member communications with a candidate. And, as you know, in response, the Staff has explained that, to the extent that those additional requirements would impose additional filing responsibilities in light of the Commission's decision in *Olson*, that would be prohibited. But, I think it's important to note that the Staff has made some very key distinctions in its report that are very valuable to us in San Diego. One of the reasons that we asked for advice is because we have been advised that there is a situation evolving, at least in our city, and somehow political trends seem to start at the top of the State and go down, so I have to believe this is going on elsewhere in the State. It's a situation whereby a candidate's fundraiser goes out to fundraise for his/her candidate and says to a potential contributor, 'Okay,

these are the contribution limits – state, local, what have you. In the City of San Diego you can give $250 to a local candidate. So, I know you really want to support my candidate and that's not very much – here's what you can do. You can give a whole bunch of money to the political party that is also supporting my candidate. They're going to coordinate those expenditures and my candidate would really appreciate that.' And, as you might expect, that type of a scenario really renders any type of state or local contribution limits useless, to a large extent. So, we were very pleased, in the Staff report, to see some very key clarification on that issue. In particular, the Staff has clarified that because of the definition of contribution and the associated regulations that go with that, despite the exemption for member communications, contributions that are made at the behest or at the direction of a candidate are still contributions to that candidate. In other words, in the situation that I described, those contributions that are made to the party would still have to be reported by the candidate as in-kind contributions subject to contribution limits. Now, I think it's important for you to understand – I came up on the flight today with April Boling, who is the treasurer in San Diego that you all know – and we discussed the Staff report. And, I think that the way I phrased my question may need some clarification from the Commission. In particular, I asked about, in my scenario, a candidate fundraising – I asked if a candidate solicits contributions to go to a political party for member communications and then the contributor goes ahead and earmarks those payments for the benefit of the candidate, which is, frankly, what we're seeing in San Diego. The parties get checks and it says on the memo line, 'Member Communication Candidate Smith.' So, I asked about earmarking as part of that. Now, in the Staff response, the Staff cites to the definition of contribution and the corresponding regulation as the reason why that activity, to the extent that it would exceed our local contribution limits, would be prohibited. But, Ms. Boling and I were talking on the way up about which actual part of that factual scenario in the fundraising triggers the violation: is it the candidate requesting that the contributor give to benefit him or her; or, is it the fact of the contributor earmarking? Because, as you know, there is also a prohibition in state law on a contributor earmarking money for the purpose of making a contribution to a candidate and, arguably, coordinating a member communication is the same as, and will be reported as, a contribution to the candidate. So, it may be valuable for us in San Diego to get some clarification. In my view, at least from looking at the laws that are cited by the Staff, it has to do with the actions of the candidate. In other words, it has to do with whether the candidate has behested the contribution or has directed the contributor to give. And, I realize that can seem like hair-splitting, but I think probably a lot of what we all do comes down to some degree of hair-splitting. So, that's the first issue that I, frankly, thought it was clear to my staff what the FPPC Staff had said, but it may need some additional clarification in light of the fact that I've used this terminology, 'earmarking,' which has triggered some other questions."

The second issue that I'd like to raise with you has to do with the same overall issue of local jurisdictions regulating member communications that support city candidates. It actually has to do with some information that the Staff provided in their report in response to my question number 8. In essence, the Staff pointed out that the State statute imposes a contribution limit on contributions that are given to a political party and that are used to support a State candidate and that are made at the behest of that candidate. And, I assume that is because it becomes essentially like a contribution, therefore, the contribution limits apply. Because of the basic, general rule between state and local jurisdictions that, as a local jurisdiction, San Diego cannot impose additional filing requirements, but we can impose additional limits. What I took from the

Staff report is that if at some point the City of San Diego were to decide to impose similar contribution limits on money that is given to local political parties and then used for the purpose of making member communications that are coordinated or done at the behest of the candidate, that that would be permissible from the perspective of the FPPC. Now, once again, I thought it was important to come up here today and clarify that that is what I am taking away from the Staff memo because I think it's much better that we come up here, all of us, and talk to you about this before we have an election and we have dispute about what the FPPC actually is telling us in terms of how the state law applies to our local jurisdiction. So, I'm here to answer any questions, but those are the two issues that I wanted to focus on. Once, again, thank you for considering our request and thanks again to the Staff for doing such an admirable job."

Chairman Randolph asked if there were any question of Ms. Fulhorst. There were none. She asked to hear from Staff on these two issues after receiving additional public comment.

Lance Olson came before the Commission representing the California Democratic Party. He stated he was not planning on making any comments until he heard Ms. Fulhorst's comments. He stated as follows: "It gives me pause here because first there was an advice letter request; they were told there was going to be an opinion; and then we were told there's a regulation. But, she seems to be walking away thinking, well, her questions have all been answered, and I don't think that's my perspective. And, when I re-read the Staff memorandum, I realize why she might come to that conclusion, and I'm a little concerned about that because it seems to me that there are some policy questions in her questions that I presume are now going to be addressed in a regulatory process. And, what I hear being said is, 'Well, I have my answers because I have a Staff memo telling me what the Staff thinks the answers are,' but the Staff, at the same time, are saying, 'But, you really need to make those decisions by way of a regulation,' which I'm perfectly comfortable with that occurring and probably am going to participate in that regulatory process, but I'm a little concerned now that this Staff memo is almost like the opinion, or I guess an advice letter request, because it purports to answer all of her questions, some of which, quite frankly, I don't agree with the answer. So, I was thinking that, well, I have an opportunity to participate through the regulatory process. It's a point I just wanted to make."

Chairman Randolph stated she understood Mr. Olson's point, adding that whatever was discussed at this meeting would not be the Commission's final determination on anything.

Mr. Olson commented that is what worried him.

Chairman Randolph stated that the regulatory process would be the Commission's determination.

Mr. Olson agreed stating there are suggested answers to some of Ms. Fulhorst's questions, which may only be the views of the Staff, not the views of the Commission, at this point, and are not necessarily the correct interpretation of the law.

Chairman Randolph agreed stating, "the idea is that we move forward with a regulatory process and make a final determination as to all of these and that final determination may or may not be exactly the same as what is in the memo."

Commissioner Leidigh wanted to know, with his initial questions, what is the standing of Ms. Fulhorst to request an opinion about the parties' duties and obligations under the Act. He understood her questioning the issue about what they could do in San Diego, knowing that there are limits on what they can do. Commissioner Leidigh thought it was appropriate for the Commission to answer for her, whether it be in the context of an opinion or advice letter. He stated he felt badly because Ms. Fulhorst had gone through this process, making the trip up here, and going away empty-handed – saying, "Oh, I'm happy as I can be because I came away with a lot of stuff I needed." Commissioner Leidigh advised that it should be understood that the Staff memorandum discussing the issues is neither an advice letter, nor an opinion of the Commission and does not have any effect in that regard. He stated, "We're either doing an opinion or we're doing regulations or we're doing an advice letter, but this isn't any of those."

Mr. Olson thanked the Commission.

Chuck Bell came before the Commission on behalf of the California Republican Party. He welcomed Commissioner Leidigh, his friend and colleague. He agreed with Mr. Olson's comments and thought the Staff memorandum was very well written. He had a few points that he disagreed with, but thought maybe the appropriate time to voice his opinions would be, "when we see the shape of prospective regulation." He thought it was important to say, since Ms. Fulhorst was present, that the Staff memorandum does not address Government Code section 85703, or the regulation adopted by the Commission several years ago, about the time the *Olson* Opinion was adopted. He further stated, "That particular section says that local jurisdictions may not adopt laws which would conflict with the member communication exception here in the Political Reform Act, insofar as that affects their contribution limits or prohibitions. That is an important point for jurisdictions like San Diego, which have both contribution limits and source prohibitions. And, so, I would just say that it may make some sense in the course of this regulatory proceeding to evaluate the impact of 85703 and your regulation 18573, which do address that." He encouraged the Commission to go forward with the regulatory project. He stated he thought the questions asked by Ms. Fulhorst were important, particularly in light of the fact that the existing regulation on this does not specifically apply to political party committees.

Chairman Randolph asked when the next election will be in San Diego.

Ms. Fulhorst responded it depends on whether the primary will be in March or June of 2008.

Chairman Randolph stated that the Commission's regulatory process should give Mr. Bell an answer in advance of the San Diego election, at least.

Chairman Randolph had a question, realizing this was not the final word on this, but she was interested about the whole issue of earmarking and what Mr. Lenkeit's view on that question was in terms of the discussion.

Mr. Lenkeit responded that the Legal Division's response was based on the candidate behest information contained in the question and the statute (85303), which states that if a contribution is made at the behest of the candidate, then, notwithstanding the regulations with regard to membership communications, if it is made at the behest of the candidate, it is considered a

contribution. He assumed if the contribution was earmarked without any participation by the candidate, then that would not come under the restrictions referred to in 85303.

Ms. Menchaca advised that that is somewhat covered in the existing regulation. It was something discussed by the Legal Division in terms of 18530.7 and certainly warrants a second look at those issues. The Staff's view is that if there is a third party that is earmarking or dedicating a particular payment for a particular expenditure, then it falls out of the exception, because this is supposed to be the organization deciding what to do with its funds and communicating with its members. So, when the outsider contributor is then saying, "use it in this particular manner," then it falls out of the safe harbor of the statute. The Legal Division drafted language in the existing regulation to deal with those issues. Whether that same rationale is applicable to political parties, because of the rules applicable to political parties, and looking at the behest issues, as well as 85303, and whether the same analysis would flow is something that the Legal Division would have to look at in a regulatory context. The same analysis may not flow.

Mr. Lenkeit added that this was part of the reason the Legal Division was recommending that this go ahead as part of a regulatory process, because there are some of these "iffy" questions that are addressed in the current regulation, but not addressed with regard to political parties.

Chairman Randolph asked if there were any other questions or comments. There were none. She asked if there was any public comment. There was none.

Chairman Randolph summarized that this has been calendared for an IP meeting in early May and will come up for prenotice in July.

Item 13. Non-Enforceable Pledges As Campaign Contributions.

Luisa Menchaca, General Counsel, Emelyn Rodriguez, Legal Division Commission Counsel, and Chief of the Technical Assistance Division Carla Wardlow came before the Commission to present an issues memorandum on the topic of pledges as campaign contributions.

Ms. Rodriguez advised that during its October 2006 meeting, the Commission had asked Staff to review this issue and prepare and issues memorandum to help determine whether further consideration or action was warranted. She continued to explain that the issues memorandum before the Commission provides a general overview regarding current state law and the Commission's existing policies with regard to campaign pledges. The memorandum also includes a discussion of different approaches used by the federal government in other states and covers various policy issues and options that the Commission may want to consider. The memorandum provides some background regarding section 82015, which defines what constitutes a contribution, as well as providing some history regarding regulation 18216, which interprets the statute. Regulation 18216 provides that only enforceable promises to make a payment qualifies as contributions under the Act. The regulation specifically excludes non-enforceable pledges from this definition because a promise is generally not enforceable unless consideration is received for it, or there is detrimental reliance on it. It is Staff's view that

under the current definition of contribution that the Commission may not regulate pledges or non-enforceable promises to make a payment. The existing regulation already reflects what may be accomplished under the current statute. In addition, the memorandum discusses various policy implications related to regulating pledges. On the one hand, reporting of such pledges could lead to more timely disclosure of campaign contributions promised to public officials and could allow for greater transparency. On the other hand, requiring the reporting of non-enforceable pledges could lead to other campaign abuses, such as candidates artificially inflating their contribution totals in order to scare off potential opponents. The Commission has several options as outlined in the memorandum. They include: (1) keeping the status quo and not require the reporting of non-enforceable pledges; (2) pursuing legislative action to require the reporting of non-enforceable pledges as contributions; or (3) pursuing legislative action to require the reporting of non-enforceable pledges on a separate schedule in campaign reports that would not impact the candidate or committee's overall contribution totals. Should the Commission decide on a policy level that it wishes to pursue changes in this area, Staff believes it must seek a legislative solution.

Chairman Randolph asked if there were any questions or comments from the Commission. There were none. She asked if there was any public comment. There was none.

Chairman Randolph stated she thought the Commission should keep the status quo, rather than pursuing any legislative changes. She was interested in hearing any other thoughts from any of the Commissioners.

Commissioner Remy wanted to hear a little discussion about option 3 – he did not care for option 2. He thought there was some utility in knowing what sort of pledges are being put forth that could have an impact in the campaign, but he did like the approach that it is not counted in the overall contribution amount. It gets to the issue of who is getting what, and for what purpose that it might be used – as Ms. Rodriguez points out, "to scare off a candidate." If it's a non-enforceable pledge, in his mind, it should not be counted on the contributions.

Chairman Randolph's concern was what "is" a non-enforceable pledge – that would rise to the level of needing to be reported? Would it be a casual, verbal promise ("Hey, Joe, I'm definitely going to give you a check next month"), or would it have to be something in writing? She was uncertain as to how the Commission would define that.

Commissioner Leidigh stated that, although it is not stated in the history, he thought Ms. Wardlow probably recalls why the Commission has this regulation. He thought it should be left as it is.

Commissioner Huguenin added that he thought the reason the Commission requested the issues memorandum was because they wanted to get some sense of the extent, as well as the nature of the problem, and until someone from the either "currently regulated community" or "to be regulated community" on this issue comes forward and suggests that it is something that requires Commission action, he agreed with the Chair and Commissioner Leidigh. Conceptually, he thinks there is a place for reporting non-enforceable pledges, particularly if people are collecting a lot of them. They could be reported separately ("inquiring minds want to know"). He

commented that it is not the Commission's job to satisfy the needs of all "inquiring minds" with regulations or even with a proposed statute. If there is a problem, so far, nobody has brought it to us as needing a solution.

Commissioner Leidigh stated he thought that the issue being articulated in the Staff memo as a problem was related to folks coming to a fundraiser, then there is a lag period before the contributions that related to attendance of the fundraiser show up. There could be many different reasons. There could be fundraisers where people attend, but they are not actually the ones cutting the check – it gets cut at some corporate situation, and it takes time. All those other things go on that may not be nefarious purpose, but if the Commission wanted to go there at all – and Commissioner Leidigh once again reiterated he was not inclined to do that – he does think it would take a legislative change because it talks about an enforceable promise. Perhaps the argument could be that if someone attends a fundraiser for which a fee is charged to attend, that then creates an obligation to make the payment and, therefore, you have something that is enforceable. The reality, Commissioner Leidigh stated, is that there were people complaining that their names showed up on a campaign report when they had not made a contribution. It can be used to either scare off opponents, or to try to pump up yourself and show that you're successful at fundraiser. Whether that's scaring anybody else or what, Commissioner Leidigh thinks it is real slippery slope and he is not convinced that the benefits to the public of some sort of disclosure outweigh potential detriments to abuse.

Chairman Randolph asked if there were any other comments.

Commissioner Blair agreed, adding that especially in the primary people should bring a committee together and say, "ten people all agree to raise $25,000 each and I just sent a press release that I just raised $250,000" – and, none of it is collected.

Chairman Randolph agreed.

Commissioner Huguenin commented that it may not ever be collected.

Commissioner Blair agreed, adding that it was done just to scare off opponents from the primary.

Chairman Randolph thanked Ms. Rodriguez, adding she thought this was very helpful.

Item 14. Legislative Report.

Chairman Randolph asked if there was anything to add to the written report. There was nothing. She asked if there were any questions on the legislative report. There were none. She asked if there was any public comment on the legislative report. There was none.

Item 15. Executive Director's Report.

Chairman Randolph asked if there was anything to add to the Executive Director's report. There was nothing. She asked if there were any questions. There were none. She asked if there was any public comment. There was none.

Commissioner Blair asked if there were any new employees to introduce.

Executive Director Mark Krausse introduced Sukhi Brar and Heather Rowan, Legal Division; Angela Brereton, Bridgette Longero, and Jesse Mainardi, Enforcement Division. He stated these new hires would be reflected in his February report.

Chairman Randolph welcomed all new employees.

Item 16. Legislative Report.

Chairman Randolph asked if there was anything to add to the written report. There was nothing.

At 12:18 p.m., Chairman Randolph announced that open session was adjourned, and that the Commission would be going into closed session immediately.

The Commission returned to open session at 1:00 p.m. Chairman Randolph advised that no reportable action was taken in closed session, and she adjourned the meeting.

Dated: January 26, 2007

Respectfully submitted,

_____
Elaine Hufnagle
Commission Assistant

Approved by:

_____
Liane Randolph
Chairman